

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

| | | |
|-------------------------------|---|----------------------|
| In re: |) | |
| |) | |
| LWMcK CORPORATION, d/b/a |) | |
| National Building Systems, |) | |
| |) | |
| Debtor. |) | |
| |) | |
| DONALD HOAGLAND, Trustee |) | |
| |) | Case No. 96-4264-JLF |
| Appellant, |) | |
| |) | Adv. No. 96-3036 |
| vs. |) | |
| |) | |
| DENK & ROCHE BUILDERS, INC.) |) | |
| |) | |
| Appellee. |) | |

ORDER

FOREMAN, District Judge:

Before the Court is a Motion for Certification Pursuant to 28 U.S.C. § 1292(b), or, in the Alternative, Motion for Rehearing/Clarification (Doc. 12) and a supporting Memorandum of Law (Doc. 13) filed by the Appellee, Denk & Roche Builders, Inc. ("D&R"). The Appellant-Trustee, Donald Hoagland, has filed a Memorandum in Opposition of Motion for Certification Under 28 U.S.C. § 1292(b). (Doc. 14). For the reasons set forth herein, the Court **GRANTS** D&R's Motion for Clarification (Doc. 12, ¶ 4, at 2) and **DENIES** its Motion for Certification (Doc. 12, ¶¶ 2-3, at 1-2).

DISCUSSION

A. Clarification of Memorandum and Order.

Both parties have stated that the Court's Memorandum and Order (Doc. 10) needs to be clarified. (*See* Doc. 12, ¶ 4, at 2, Doc. 13 at 5; Doc. 14 at 1). The Bankruptcy Court granted D&R's motion for summary judgment and denied Trustee's. (*See* Doc. 32, ¶¶ 24-25, at 9). This Court reversed the Bankruptcy Court's judgment. The Court's reversal of the Bankruptcy Court's judgment concerned only the grant of summary judgment in favor of D&R. The Court did not intend for the Bankruptcy Court,

based on this Court's Memorandum and Order, to automatically grant summary judgment in favor of Trustee on remand.

Both parties have expressed concern over whether the Court intended for the Bankruptcy Court to engage in the ministerial act of entering findings of fact concerning D&R's "new value" defense under 11 U.S.C. § 547(c)(1), or whether the Court intended for the Bankruptcy Court to hold a full evidentiary hearing on the issue. Simply, D&R raised the issue in its pleadings, but the Bankruptcy Court did not reach the issue in its order due to the limited scope of its holding. Accordingly, this Court did not conclusively address the "new value" issue. While the Court did address D&R's argument that there was "new value" exchanged due to Debtor's release from its contractual obligation and stated that this argument was tenuous in light of Seventh Circuit precedent, the Court could not make a definitive determination of whether there was, in fact, "new value" exchanged.

Whether the "new value" issue requires a full evidentiary hearing on remand turns on whether D&R has anything other than Debtor's release from its contractual obligation to offer in support of its argument. *See In re Energy Coop.*, 832 F.2d 997, 1003 (7th Cir. 1987) ("We agree ... that the release [from a contractual obligation] and goodwill do not fall within § 547(a)(2)'s definition of new value. To hold otherwise would be inconsistent with the contemporaneous exchange exception's purpose.").

The Court also notes that its holding with regard to Trustee's claim under 11 U.S.C. § 547(b) was narrow. The Court only reached the threshold issue of whether there was a transfer of an interest of the debtor in property. It expressed no opinion as to the existence or nonexistence of the remaining elements that Trustee must prove under this provisions to avoid the transfer. *See* § 547(g) ("For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b). . .").

B. D&R's Motion for Certification.

Because there are issues open on remand, the Court's Memorandum and Order was not a final order. Accordingly, it is necessary to address D&R's Motion for Certification under 28 U.S.C. § 1292(b).

The Seventh Circuit has determined that discretionary appeals under § 1292(b) are appropriate in bankruptcy cases, assuming, of course, that all necessary elements are present. *See, e.g., In re Moens*,

800 F.2d 173, 177 (7th Cir. 1986). For the Court to certify a question for interlocutory appeal, there must be "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. § 1292(b). The Court does not reach the issues of whether there is a controlling question of law and whether there is substantial ground for difference of opinion. It denies D&R's request for certification because an immediate appeal from its Memorandum and Order will not materially advance the ultimate termination of the litigation.

D&R argues that an interlocutory appeal will materially advance the termination of this case. Specifically, D&R argues that if the transfers at issue did not involve a transfer of an interest of the debtor in property (§ 547) or property of the debtor's estate (§ 549), no action would lie under the Code. The Court does not deny this fact and said as much in its order. The converse of D&R's argument, however, is also true. If the Court were to certify this question for interlocutory appeal and the Seventh Circuit affirmed this Court or denied review, the case would need to go before the Bankruptcy Court on remand.

D&R has provided strong arguments as to how certifying this question would preserve judicial and monetary resources. In determining whether to certify a question for interlocutory appeal, however, this Court must take precaution to avoid the risk that an appeal may actually impede rather than expedite the conclusion of the entire case. *See Fisons, Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972). The burden is on D&R to justify departing from the policy of postponing review until after final judgment, *see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1977), and it has not done so.

CONCLUSION

For the reasons set forth above, D&R's Motion for Clarification (Doc. 12, ¶ 4, at 2) is **GRANTED**, and its Motion for Certification under 28 U.S.C. § 1292(b) (Doc. 12, ¶¶ 2-3, at 1-2) is **DENIED**. The Clerk of the Court shall enter an amended judgment.

IT IS SO ORDERED.

DATED: **February 3, 1998.**

/s/ James L. Foreman
DISTRICT JUDGE